No. 377

# In The
# United States Supreme Court

## OCTOBER TERM, 1940

FRED SPIKES
*Petitioner*

versus

STREET & SMITH PUBLICATIONS, INC.,
*Respondent*

## PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Fifth Circuit


MARK McMAHON,
Sinclair Building,
Ft. Worth, Texas,
F. D. BROWN,
Lubbock, Texas,
Attorneys for Petitioner.

G. E. LOCKHART,
Lubbock, Texas,
NELSON & BROWN and
GEO. V. McCLESKEY,
Lubbock, Texas,
Of Counsel for Petitioner.

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## PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals
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TO THE HONORABLE, the CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Fred Spikes, a resident citizen of the State of Texas, respectfully presents this, his petition for Writ of Certiorari to the Circuit Court of Appeals of the United States for the Fifth Circuit to review a final judgment of said Circuit Court entered on June 12th, 1941, where it reversed a judgment of the District Court of the United States for the Northern District of Texas, Lubbock Division, and represents:

## SUMMARY STATEMENT OF THE MATTER INVOLVED

Street & Smith Publications, Inc., is a corporation domiciled in the State of New York, engaged in the business of publishing and selling weekly, semi-weekly, and

monthly magazines of the so-called "popular" or "pulp" type. Among these is a weekly publication known as "Western Story Magazine." These publications, including "Western Story Magazine," are printed by said corporation at Chicago, Illinois. These magazines are published with the expectation and intention upon the part of the corporation that they will be distributed and sold in every State of the United States and many foreign countries. They are distributed and sold in every State, including the State of Texas, under a contract styled "Wholesale Distributors Contract" a copy of which appears on pages 26 to 31 inclusive of the Record.

In the issue of September 24th, 1938, of said "Western Story Magazine" appeared an article (R. 3-4) designating petitioner, Fred Spikes, as an outlaw and cattle rustler, and as one of those who "after some gun battles that are classics in Western History * * * hid in caves and lived on prairie dogs and traveled only on dark nights as they hightailed out of the country."

Alleging such article to be libelous as to him, petitioner filed suit in a district court of the State of Texas, which respondent removed upon petition and bond to the District Court of the United States for the Northern District of Texas, Lubbock Division. Respondent sought to quash the jurisdiction upon the ground that it was not present in the State of Texas, and consequently not suable in that State. (R. 47.) The District Court overruled this motion (R. 51) and the case proceeded to trial on the merits. Upon such trial Petitioner recovered judgment in the amount of $3000.00. (R. 176.)

Upon appeal, the Circuit Court of Appeals for the Fifth Circuit held that Respondent's motion to quash the

jurisdiction was well taken because "appellant was not doing business in Texas, so as to be present there," and reversed the case with directions to sustain Respondent's pleas to quash jurisdiction.

## REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

The single question involved is whether or not, under the facts of this case which are undisputed, Respondent, Street & Smith Publications, Inc., in conducting its business in the manner it did within the State of Texas, was doing business within that State so as to be present there, so that service upon its Agent within the State of Texas subjected it to the jurisdiction of a District Court of the United States within that State.

Respondent's publication concerning petitioner was libelous, per se. It described him as a cattle thief and outlaw. Respondent's domicile is the State of New York. It prints its magazines in the State of Illinois. It delivers its magazines by express and mail to every state in the United States. It is not controverted that the magazine in which the libelous publication was made was published by Respondent with the express purpose and intent that it should be distributed, circulated and sold within the State of Texas. 3165 Copies were distributed, circulated and sold within the State of Texas. Respondent's distribution of the libelous publication in Texas was under a contract with K. H. Page, a citizen of Texas, domiciled at Fort Worth, in that State. This contract is styled "Wholesale Distributors Contract," and provides among other things that Respondent retains title to its magazines until they are disposed of by retailers, or the covers on returns destroyed. It contains every element necessary to create agency, including an express designation of him as "agent of the company." (R. 26-31.)

The holding of the Circuit Court of Appeals that under these facts Respondent was not doing business within the State of Texas so as to be present there, presents a question of federal procedure, which has not been (as pertains to the publication of libelous matter) heretofore determined, but which should be determined by this Court. The matter of whether or not under similar methods of operation foreign corporations are doing business within a State so as to be present there, and amenable to suit in the courts of such State by service upon its agent within the State, has been heretofore determined by this Court in WILCOX & GIBBS SEWING MACHINE COMPANY V. EWING, 141 U. S. 627, 35 L. Ed. 882; and INTERNATIONAL HARVESTER COMPANY OF AMERICA V. KENTUCKY, 234 U. S. 579, 58 L. Ed. 1479, in favor of jurisdiction, and Petitioner represents that the decision of the Circuit Court of Appeals in this case is in conflict with the decisions of the Supreme Court in the cited cases.

WHEREFORE, for the reasons set forth herein, as well as in the supporting brief hereto annexed, Petitioner respectfully prays this Court to issue its Writ of Certiorari to the Honorable Circuit Court of Appeals for the Fifth Circuit, commanding it to forthwith send up a full and complete transcript of the record; that all proceedings be certified to this Court, and that this cause be reviewed and the manifest errors of the Circuit Court of Appeals be revised and corrected as provided by law; that upon hearing by this Honorable Court the judgment of the Circuit Court of Appeals reversing this case with instructions to the District Court to sustain Respondent's pleas to quash the jurisdiction be reversed, and the judg-

ment of the District Court affirmed, and that such other and further proceedings be had herein as may be provided by law and equity.

MARK McMAHON,
Sinclair Building,
Ft. Worth, Texas.
F. D. BROWN,
Lubbock, Texas,
Attorneys for Petitioner.

G. E. LOCKHART,
Lubbock, Texas,
NELSON & BROWN and
GEO. W. McCLESKEY,
Lubbock, Texas,
Of Counsel for Petitioner.

THE STATE OF TEXAS }
COUNTY OF LUBBOCK }

F. D. Brown, being duly sworn, says that he is of counsel for Fred Spikes, Petitioner in the foregoing petition for Certiorari; that he prepared the foregoing Petiton for Writ of Certiorari and that the allegations therein are true, and that there is just cause for same, as he verily believes.

F. D. BROWN

Subscribed and sworn to before me this this the 24th day of July, A. D. 1941.

EVELYN CAUGHRON
Notary Public, Lubbock
County, Texas.

(SEAL)

## BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

1.

## OPINION OF THE COURT BELOW

The opinion of the Circuit Court of Appeals has not been yet officially reported. It is contained in the printed record.

2.

## JURISDICTION

(a) This case is concerned with the protection of a citizen of a State in his right of privacy and to the enjoyment of a good reputation, from libelous publications contained in a magazine published by one domiciled in another State, but publishing such magazine with the actual intent and purpose that it be circulated and sold in the State where such citizen is domiciled. In this case such magazine was actually circulated and sold through wholesale distributors, the publisher retaining title to the magazine even after the issue had passed into the hands of the distributor. That the citizen so wronged should be guaranteed the right of redress by suit in the appropriate courts of original jurisdiction within the State where he is domiciled, is submitted by petitioner to be a question of grave importance to the jurisprudence of the United States such as should be determined by this Court.

(b) The opinion of the Circuit Court of Appeals, in holding that under the evidence in this case the Respondent, Street & Smith Publications, Inc., was not doing business in the State of Texas at the time service was had upon its agent, Page, is conceived by petitioner to be in direct conflict with the decisions of the Supreme Court of the United States in the cases of WILCOX & GIBBS SEWING MACHINE COMPANY V. EWING, 141 U. S. 627, 35 L. Ed. 882; and INTERNATIONAL HARVEST-

ER COMPANY OF AMERICA V. KENTUCKY, 234 U. S. 579, 58 L. Ed. 1479, in that in each of such cases, under a legal situation created by facts approximating those in the instant case, the Supreme Court held that the Corporation was present and doing business in the State where suit instituted, whereas in the instant case the Circuit Court of Appeals has held that Respondent was not present and doing business in the State of Texas where suit was instituted.

3.

## SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred in holding that under the facts of this case Respondent was not present and carrying on business in the State of Texas, at the time service was had upon its agent, and upon such holding, reversing the cause with instructions to the District Court to sustain Respondent's pleas to quash the jurisdiction.

4.

## ARGUMENT

The magazine in question, which is one of many magazines published by Respondent, was published with the intent upon the part of Respondent that it would be distributed, sold and circulated by it in all of the States of the United States and many foreign countries. Indisputably, Respondent is engaged in interstate commerce. While it did not procure a permit to do business within the State of Texas, it entered into a contract with Page, a citizen of the State of Texas, for the distribution of the magazines published by it (R. 26-31), the pertinent provisions of which are as follows:

In paragraph 5 of Subdivision B, Page is required to:

> "Supply and deliver all periodicals and magazines sent to him by the Company to retailers includ-

ing street and carrier venders, for resale to the public, on, but not before their regular publication dates, and at authorized prices. To also pick up and credit his dealers with all unsold copies of magazines within proper time limits set by the Company."

In paragraph 6 of Subdivision B, he is required to:

"Keep all his customers at all times adequately supplied with the periodicals and magazines circulated by the Company by re-supplying, as often as may be necessary, those who sell out before the next publication."

In paragraph 7 Subdivision B, he is required to:

"Extend the distribution of the Company's magazines and periodicals by constant and intelligent efforts to increase the sales of the old retailers and to add new retailers whenever such dealers are in a position to sell said magazines and periodicals."

In paragraph 8 of Subdivision B, he is required to:

"Distribute to retailers, advertising matter, dealer's helps, posters, circulars, and other material which may be provided by the Company."

In paragraph 10 of Subdivision B, he is required:

"To tear or cut in half or otherwise render useless for reading purposes all coverless (otherwise known as returns) copies of the Street & Smith magazines and periodicals before disposing of same to any paper dealer or otherwise."

And it is further provided:

"It is understood that title remains with the Company until returns are so destroyed."

It is provided in paragraph 11 of Section B that Page is to:

"Make no less than two deliveries of the Street & Smith magazines and periodicals each week, i. e., on Wednesday and Friday. If it is determined by the Company that three deliveries are necessary to serve the best interest of the publications distributed under this agreement, the Distributor hereby agrees to increase the deliveries to three each week."

In paragraph 1 of Subdivision C, it is provided that the contract may be terminated among other things for "unsatisfactory service as agent of the Company."

We submit that this contract admits but one construction, and that under its terms the Respondent is shown to be engaged in the business of selling its magazines and periodicals within the State of Texas, and that in this business Page is exactly what the parties themselves, in making the contract, describe him as being—"agent of the Company."

The contract specifically provides that title to the magazines does not pass in the State of New York. It specifically controls the disposition which Page is to make of such magazines after they are received by him, states how and when he is to distribute them to retail dealers, when he is to pick up unsold copies, and again specifically provides:

> "It is understood that title remains with the Company until returns are so destroyed."

If Respondent has title to its magazines while they are in Texas, most certainly it is publishing and selling these magazines in Texas. Page, by the contract, is not required to remit for any magazines, except those which the retail dealers, to whom he distributes them, sell to the public. He is credited with all others when he returns the covers, and title to these "coverless magazines remains with the Company" until they are torn or cut in half or otherwise rendered useless for reading purposes.

Page is required by the contract to "extend the distribution of the Company's magazines and periodicals by constant and intelligent efforts" and to "distribute to retailers, advertising matter, dealer's helps, posters, circulars, and other material which may be provided by the Company."

We call attention to the testimony of Mr. Page, appearing on pages 65 to 85 of the Record, and the following specific portions thereof:

> "Q. They send you at their discretion, unless your order differs, whatever amount of magazines they think can be sold here?

A. Yes, sir." (R. 74.)

* * * * * * * * * * * *

"Q. They maintain traveling salesmen making trips through Texas, do they not?

A. We have had people call on us.

Q. Traveling for Street & Smith Publications?

A. Yes, sir.

Q. What did they talk to you about when they called on you?

A. They tried to interest us in buying more of their magazines.

Q. To pick up the trade as far as possible?

A. Yes, sir.

Q. This sale of Street and Smith Publications in a town is a continuous matter?

A. Yes, sir, in Texas for years and years and years.

Q. They sell them every week?

A. Yes, sir.

Q. Weekly magazines, semi-weekly magazines, monthly and semi-monthly magazines?

A. Yes, sir." (R. 76.)

The testimony of Mr. Henry W. Ralston, Respondents vice-president (R. 107-111), establishes that Street & Smith Publications does ship and deliver magazines published by it to dealers and distributors within the State of Texas, on each and every week in the year, and have done so for a number of years.

His further testimony is:

"18. It is a further fact, is it not, that Street & Smith Publications, Inc., is paid for these magazines by the persons or companies within the State of Texas to whom the same are shipped or delivered?
Not entirely so. The American News Company pays for its branches' magazines on blanket invoices.

19. Does Street & Smith Publications, Inc., ever send any employees or representatives into the State of Texas?
Yes.

20. If so, please name such employee or representative, giving his or their address or ad-

dresses, and state what such employee or representative does on these trips?
We have had during a number of years various employees, all of whose names I cannot remember, who are sent not only into Texas but into many other adjacent states. The employee we send around about once or twice a year merely looks over stands of retailers who buy magazines from the independent wholesalers and sell same to the ultimate reader. These retailers sell perhaps 100 different magazines put out by at least 20 different publishers. Our employee will look over the stand, see how magazines published by Street & Smith are set up and will offer suggestions to the retailers as to how the magazines may be better displayed on his stand or how the advertising matter he has might be used to better advantage. He does not in any way interfere with the conduct of the retailer's business and, if the retailer does not wish any suggestion or advice, he receives none. Our representative makes no collections from anybody to whom we sell our publications. It is unnecessary to do so because all accounts are guaranteed by a deposit left with us in this City.

21. Is it or not a fact that one of the duties of such representative is to look over the stand of a retailer, observe how the magazines published by Street & Smith Publications, Inc., are set up on the stand, and to offer to such retailers suggestions as to how the magazines may be better displayed, or the advertising matter furnished be used to better advantage?
Yes, but only if the retailers desire suggestions.

22. In other words, it is the duty, is it not, of such representative to cooperate with the dealer in any way he can, to promote and increase the sales of magazines published by Street & Smith Publications, Inc?
Except to the extent mentioned above, this traveling man has no other duty." (R. 109-110.)

On page 142 of the Record is shown a list of magazines published by Street & Smith Publications, Inc., and which such witness testified were sold and distributed in

Texas, and on pages 160, 161 and 162 is shown a record, testified to by the witness, of the sales in Texas, of the magazine containing the alleged libelous article, showing the distribution of 3165 copies thereof in Texas.

The case of WILCOX & GIBBS SEWING MACHINE COMPANY V. EWING, 141 U. S. 627, 35 L. Ed. 882, construes a contract in many respects similar to that under investigation here. It is said:

> "There was some discussion at the bar as to whether Ewing was, strictly, an agent of the company. We think he was. He was none the less an agent because of his appointment as 'exclusive vendor' of the defendant's machines within a particular territory or because of the peculiar privileges granting to or the peculiar restrictions imposed upon him. * * * * * The agreement constituted him the sole agent of the company for the sale of its machines within a certain territory. It is true that the machines he undertook to sell were to be purchased by him from the company at a large discount. But he could not sell them by retail below the regular retail prices. This arrangement was the mode adopted to protect the company's interests, and to secure the plaintiff such compensation for his services as would induce him to devote his time, attention and abilities to the company's interests. He was still a mere agent to sell such machines as might be delivered to him under the contract."

In the case of INTERNATIONAL HARVESTER COMPANY V. KENTUCKY, 234 U. S. 579, 58 L. Ed. 1479, supra., such company had evidently made a studied and planned program to avoid legal service in the State of Kentucky: it entered into a written contract with its agents to effect such. While permitting them to make sales in Kentucky, each and every paragraph was breathing with limitations manifestly drawn so as to restrict the power of agency. The contract drawn was not dissimilar to the one now before the Court. In that case the Supreme Court held that the Harvester Company was present and doing business in Kentucky so as to be amenable to process there.

The contract between Respondent and Page was very definitely winthin the rule laid down in 2 C. J. 420, paragraph 4, wherein it is said:

> "The most characteristic feature of an agent's employment, in a legal sense, is that he is employed primarily to bring about business relations between his employer and third persons, and this power is perhaps the most distinctive mark of the agent as contrasted with others, who act in representative capacities."

Cases definitely supporting petitioner's contentions that the District Court had jurisdiction to try this case and dispose of the issues involved upon the merits, are BOARD OF TRADE V. HAMMOND ELEVATOR COMPANY, 189 U. S. 424, 49 L. Ed. 1111, and REAL SILK HOSIERY MILLS V. PHILADELPHIA KNITTING MILLS CO. (3rd Circuit) 46 F. 2d 25.

In this connection, may we say, it appears to us that there is a wide difference between the merchandising of automobiles, and other articles of commerce, and the business of publishing and distributing magazines and periodicals. This difference was recognized in CLEMENTS V. MacFADDEN PUBLICATIONS (D. C. E. D. TEX), 28 F. Supp. 274, the Court saying:

> "To carry the present line of holdings to any greater extent than they now exist could easily result in a publication two thousand miles away destroying a man's reputation, whether he be great or small, and requiring him to come to unfriendly territory perhaps, to effect his vindication in the courts of justice. For this reason and for others it is manifest that the shipment and circulation of printed documents should hardly be grouped and classed with ordinary articles of merchandise."

In this case, as is shown by the pleadings and evidence introduced, Respondent, though actually printing its magazine in the State of New York, brought that magazine to the community in the State where Petitioner resided, and there, upon his doorstep, and among his neighbors, sold the magazine which contained the libelous

publication concerning him. It would be a strange rule of law which would hold that Respondent could come to Petitioner's home in Texas and strike at him with words no less deadly than bullets, and yet hold that he could obtain no redress in Texas, because in selling its libelous publication in Texas "it was not present and doing business in Texas."

5.

Petitioner respectfully prays that Writ of Certiorari be granted, and that upon hearing of this cause, the judgment of the Circuit Court of Appeals reversing that of the District Court, be reversed, and the judgment of the District Court affirmed.

MARK McMAHON,
Sinclair Building,
Ft. Worth, Texas.
F. D. BROWN,
Lubbock, Texas,
Attorneys for Petitioner.

G. E. LOCKHART,
Lubbock, Texas,
NELSON & BROWN and
GEO. W. McCLESKEY,
Lubbock, Texas,
Of Counsel for Petitioner.

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OCTOBER TERM, 1941

No. 336

FRED SPIKES,

*Petitioner,*

against

STREET & SMITH PUBLICATIONS, INC.,

*Respondent.*

## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

NEIL P. CULLOM,
*Counsel for Respondent.*

NEIL P. CULLOM,
JAMES E. FREEHILL,
*on the Brief.*

CORPORATE PRESS, INC., NEW YORK CITY

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STREET & SMITH PUBLICATIONS, INC.,
*Respondent.*

## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

### Opinion Below.

There was no opinion in the District Court. The opinion of the Circuit Court of Appeals (R. 202-5) is as yet unreported.

### Jurisdiction.

Petitioner seeks to review a judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered on June 12, 1941, whereby a judgment of the District Court of the United States for the Northern District of Texas, Lubbock Division (Judge T. WHITFIELD DAVIDSON) in favor of plaintiff for $3,000 was reversed, on the ground that the Texas courts had no jurisdiction over defendant, in that it was not doing business and was not represented by any agent in Texas at the time when service of process was sought to be effected (R. 205).

Jurisdiction of this court is sought to be invoked upon two grounds: (1) That a citizen of Texas, claiming to have been libeled, "should be guaranteed the right of redress by suit in the appropriate courts of original jurisdiction within

the State where he is domiciled"; and (2) because the decision of the Circuit Court of Appeals is claimed to be at variance with two decisions of this court—*Wilcox & Gibbs Sewing Machine Co.* v. *Ewing,* 141 U. S. 627, and *International Harvester Co.* v. *Kentucky,* 234 U. S. 579 (Petitioner's Brief, pp. 7-8).

It is submitted that neither ground affords any basis for invoking this court's jurisdiction. Rule 38 of the United States Supreme Court, General Rules, paragraph 5, provides:

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered: * * *
>
> "(b) Where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter; or has decided an important question of local law in a way probably in conflict with applicable local decisions; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way probably in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

There are no "special and important reasons" for granting this writ; the decision sought to be reviewed is not in conflict with any decision of any other circuit court of appeals on the same matter but, on the contrary, is in complete harmony with the decisions of all other circuits; no important question of local law is involved; and no such question of Federal law, which should be settled by this court. The decision is not in conflict with applicable deci-

sions of this court but is in harmony therewith; and the decision embodies no departure from the "accepted and usual course of judicial proceedings" such as to call for the exercise of this court's power of supervision.

In *Layne & Bowler* v. *Western Well Works,* 261 U. S. 387, 67 L. Ed. 712, it is said (p. 393):

> "If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal. The present case certainly comes under neither head."

See, also,

*Forsyth* v. *Hammond,* 166 U. S. 506, 514.

**Statement.**

Petitioner, Fred Spikes, plaintiff below, filed suit in the 72nd District Court of Lubbock County, Texas, against respondent, Street & Smith Publications, Inc., a corporation organized under the laws of the State of New York, defendant below, for damages in the amount of $25,000 allegedly resulting from publication of a libelous magazine article charging the "Spikes Gang" with cattle rustling in Eastern New Mexico sometime between the Civil War and the year 1902 (R. 34-44), when, according to the evidence, some of the members were killed while resisting arrest, and the survivors were finally caught and convicted in the Federal Court (R. 162-164).

The plaintiff does not allege that *he* was a member of the "gang." He merely alleges that by the terms "Spikes

Gang" and "Spikes" are meant "Spikes brothers," consisting of himself and five others, although there is no reference whatever in the article to Spikes family, brothers, cousins, or nephews, etc., and although there is no reference in the article whatever to the names or number of men belonging to the gang. Neither does the plaintiff's petition contain a denial of the fact that there was a "Spikes Gang," and that it was made up of cattle thieves.

There was no reference in the article to the petitioner, Fred Spikes. There being no denial that there was a "Spikes Gang" composed of cattle thieves and petitioner not having been named in the article and not claiming membership in that small fraternity of choice spirits, the "Spikes Gang," it is elementary that plaintiff's petition failed to state facts sufficient to constitute a cause of action, nor did his proof supply the defect. Hence, the motion for peremptory instruction and to set aside the verdict should have been granted (R. 178-181). *Harris* v. *Santa Fe Townsite Co.* (Tex. Civ. App.), 125 S. W. 77 (Writ ref.); *McCormick* v. *Houston Printing Co.* (Tex. Civ. App.), 174 S. W. 853 (Writ ref.).

The evidence shows overwhelmingly, in the present case, that there was a "Spikes Gang" composed of cattle thieves of various names operating in New Mexico, and that, after some of them were killed in a gun battle while resisting arrest by a posse of officers, the survivors "hightailed" it out of the country and all but one or two were finally apprehended and sentenced to the penitentiary (R. 162-164).

**Procedure.**

The sheriff certified that he served citation upon defendant's "duly authorized agent, Coy W. McMillan" (R. 7-8). The cause was removed to the United States District Court (R. 9-10). Upon defendant's motion, the aforesaid citation

served upon the said Coy W. McMillan (R. 11-18) was quashed by the Federal Court (R. 31-32). Thereupon plaintiff filed his "First Amended Original Petition" containing virtually the same allegations (R. 34-43). Summons was then issued with marshal's return reciting service upon defendant "by delivery to K. H. Page, its local agent," in Forth Worth, Texas (R. 45-46). Defendant moved to quash the summons (R. 47-51) upon the ground, among others, in substance, that the defendant, a foreign corporation, without a permit to do business in Texas, had never engaged in business in said state, and that the said K. H. Page was not an officer, agent or other representative upon whom service could be had (R. 47-51). Notwithstanding verification and proof, the Court overruled the motion (R. 51-52), to which action the defendant then and there duly objected and excepted (R. 52), the bill being approved by the Court (R. 65). The defendant also filed plea in abatement and motion to dismiss because of want of jurisdiction for reasons stated (R. 85-88). The plea and motion likewise were overruled, to which action the defendant further excepted (R. 88-89). Thereupon the defendant was forced to appear and file answer in which it specifically denied each of the plaintiff's allegations, as shown by "Supplemental Record" filed in this Court (Sup. Rec. 2-7).

In every instance when the defendant appeared, either by plea, motion, objection, or exception, it did so for the sole and limited purpose of attacking jurisdiction and service, and without appearing generally or submitting to the jurisdiction of the court, and, finally, when defendant was forced to file answer, it made appropriate reservation to the effect it was not waiving objection to such jurisdiction and service (Sup. Rec. 2). Such action was enough to save the point. *Employers Reinsurance Corp.* v. *Bryant* (Texas) 299 U. S. 374, 81 L. Ed. 289; *Hassler* v. *Shaw,* 271 U. S. 195,

70 L. Ed. 900; *Mexican Sen. Ry.* v. *Pinkney* (Texas) 149 U. S. 194, 37 L. Ed. 699; *General Inv. Co.* v. *Lake Shore Co.*, 260 U. S. 261, 67 L. Ed. 244.

Upon trial, before a jury, judgment was rendered for plaintiff against said defendant for the sum of $3,000 and costs (R. 176-177).

At the conclusion of the evidence, and before the cause was submitted to the jury, the defendant filed and presented request for peremptory instruction (R. 178). Likewise the defendant moved to set aside the verdict upon the grounds above stated, and herein presented as the propositions upon which the judgment below should be reversed (R. 179-180), but all said requests and motions were refused and overruled, to which action the defendant duly excepted (R. 179, 181).

**The Facts re Jurisdiction.**

There is no conflict as to the facts of record in respect of jurisdiction. This is conceded by petitioner (Brief, p. 3). The learned Circuit Court of Appeals' statement of these facts is clear, concise and accurate (R. 203):

> "The evidence on the jurisdictional point is undisputed and may be briefly stated. Plaintiff is incorporated under the laws of New York, its principal place of business is in the City of New York. It has not and has never had a permit to do business in Texas, and its publications are distributed interstate, through dealers who purchase its magazines and themselves distribute them in the states. K. H. Page, its Texas distributor, under a wholesale distributor's contract, purchases and sells its magazines in Texas, as its distributors in other states purchase and distribute them there. Page, the Texas distributor, bought magazines, not only from appellant but from other publishers, and sold them to dealers in Texas, only 3 to 5% of his business being done with appellant.

"Page, like the other distributors, maintained an individual place of business, at his own expense, paying his own rents and salaries; if any of his customers defaulted, the loss fell on him. Appellant, never had any office or place of business in Texas, never had any agent or other representative in the state; never had or kept any publications in the state for sale; never solicited any business in the state; never entered into any contracts nor kept any bank account nor made any collections there. Monthly checks of the distributor are mailed to New York and in the event of default on his part, his indebtedness is liquidated by a cash deposit, held by appellant in New York as security for the faithful performance of the obligations of his distributor's contract. Among its material obligations the contract requires the publisher to supply magazines and periodicals, f.o.b., Lubbock, Texas, at its regular price and terms, and requires the distributor to pay for the magazines and periodicals, delivered to him under the contract, at the prices and upon the terms set forth in the invoices.

"In summary, appellant has no office, officer, director, executive, statutory or other agent or employee, in Texas; it never conducted any of its executive functions in that State and at no time had a bank account, property, books, corporate or other records in Texas. It makes no purchases or sales in that State; it makes no deliveries in Texas and receives no payments there. There is no one in Texas who has any authority to make any contracts of any kind for the appellant. All of its activities and functions, executive, ministerial or otherwise are conducted outside Texas."

This statement of facts is abundantly supported by the record (R. 25, 54, 61, 65, 26-30, 71, 56-60, 82). It is not challenged, in the slightest particular, by petitioner.

## POINT I.

**The undisputed evidence demonstrates conclusively that appellee was merely engaged in an interstate business and was not present and doing business in Texas by agent or otherwise.**

*Consolidated Textile Corp.* v. *Gregory,* 289 U. S. 85, 77 L. Ed. 1047;
*Cannon* v. *Time, Inc.,* 115 Fed. (2) 423;
*Peoples Tobacco Co.* v. *American Tobacco Co.,* 246 U. S. 79, 62 L. Ed. 587;
*Green* v. *C. B. & Q. Ry. Co.,* 205 U. S. 350.

In *Consolidated Textile Corp.* v. *Gregory,* 289 U. S. 85, the court said:

> "In order to hold a foreign corporation not licensed to do business in a state responsible under the process of a local court the record must disclose that it was carrying on business there at the time of attempted service."

The very recent case of *Cannon* v. *Time,* 115 Fed. (2) 423 (C. C. A. 4), is strikingly similar to the case at bar. This appears clearly from the statement of facts by the court. Judge PARKER, writing for the unanimous court, said (p. 425):

> "On these facts, we think that the court below properly held that the defendants were not doing business within the state so as to subject them to the service of process."

Continuing, Judge PARKER quoted from *Consolidated Textile Corp.* v. *Gregory,* 289 U. S. 85, *supra,* citing *International Harvester Co.* v. *Kentucky,* 234 U. S. 579, 34 S. Ct. 944, 58 L. Ed. 1479. The court said:

> "The general rule deducible from all our decisions is that the business must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is, by its duly authorized officers or agents present within the state or district where service is attempted. *People's Tobacco Co.* v. *American Tobacco Co.*, 246 U. S. 79, 87, 38 S. Ct. 233, 235, 62 L. Ed. 587, Ann. Cas. 1918 C, 537."

The court further observed:

> "The relationship of the News Company to these transactions was the same in both instances, i. e., that of an independent contractor."

There is one important difference in the facts of that case and the case at bar. Here, the respondent did not solicit or receive subscriptions in the State of Texas. In the *Cannon* case, defendant did so solicit and receive subscriptions in Virginia. Upon this fact, the plaintiff based a contention that in so doing the party soliciting and receiving the subscriptions became the agent of the non-resident publisher. In rejecting this contention, the court said (p. 425):

> "So far as doing business within the state is concerned, we see no difference in principle between these transactions and those involving sale of the magazines at the news stands. If such transactions constitute a doing of business within the state, then all magazines which accept subscriptions through the so-called subscription agencies which send around traveling representatives are doing business in every state in the Union.
>
> "Even if the News Company be considered the agent of defendants in accepting and collecting for subscriptions, it does not follow that the defendant should be held present and doing business within the state. Mere solicitation of business by an agent does not constitute such a doing of business as to subject a foreign corporation to the local jurisdiction; and the situation is not changed by the fact that the agent

> may collect some money in connection with the business solicited (citing *Green* v. *C., B. & Q. R. Co.*, 205 U. S. 530, 51 L. Ed. 916, and many other authorities). * * * If regarded as the doing of business within the state, the business is not of sufficient volume or importance to warrant the inference that the corporation itself is present within the state by its duly authorized officers or agents upon whom service of process may be had."

"It is true," as observed by the court in the *Cannon* case, that a magazine "business" (very similar to the one here) was done in the state, "but this was business done by the stores and news stands *for themselves, not as agents for the defendants* * * * and the true situation was that the stores and news stands were not the agents of defendants but were *independent contractors* dealing on *their own account.*"

In other words, as pointed out by the court in *Truck Parts, Inc.* v. *Briggs Clarifier Co.*, 25 Fed. Supp. 602:

> "The defendant was not doing business in Minnesota. The distributor was. The distributor was an independent merchant buying products from the defendant, and then selling these products which he had purchased from the defendant to the people of his state. * * * The defendant was a vendor and the distributor was a vendee."

A parallel situation is presented in *Whitaker* v. *MacFadden Publications, Inc.* (U. S. C. of A. for D. C.) 105 Fed. (2) 44. There it is said:

> "Defendant is a New York corporation. It sells and ships its magazines to, and collects payment from, the District News Company, of Washington, D. C. The District News Company resells to and collects from retailers and street vendors. Pendergast and four assistants, for remuneration which defendant pays by check from New York, supervise and promote sales of the magazines among the street vendors who buy their stock from the District News Company.

> Pendergast solicits neither advertising nor subscriptions, and neither collects nor forwards money to defendant. Neither the District News Company nor Pendergast is authorized to make any contracts for defendant. Defendant has no place of business in the District, but the District News Company furnishes Pendergast with an office and telephone on its premises without cost to him or to defendant."

From the foregoing statement of facts, the court concluded in the *Whitaker* case, *supra*, after analyzing and applying the Supreme Court's holding in *Green* v. *C. B. & Q. R. Co., supra,* that

> "If the Burlington was not doing business in Pennsylvania, by stronger reasons, MacFadden is not doing business here."

While it is but natural that every state is inclined to claim, as far as possible, jurisdiction over persons doing business within its borders, in order that its injured citizens may have a local court in which to obtain redress, the courts of Texas, nevertheless, do not pretend to have jurisdiction over foreign corporations under the facts of this case. For example:

> *Creager* v. *P. F. Collier & Son (Publishing Co.)*, 36 Fed. (2) 783;
>
> *John A. Dickson Publishing Co.* v. *Bryan* (Tex. Comm. App.), 5 S. W. (2d) 980, 60 A. L. R. 983 (annotated);
>
> *Southwest General Electric Co.* v. *Nunn Electric Co.* (Tex. Comm. App.), 283 S. W. 781;
>
> *Item Co., Ltd.* v. *Munn* (Tex. Civ. App.), 293 S. W. 670;
>
> *American Mfg. Co.* v. *Skidmore Drug Co.* (Tex. Civ. App.), 170 S. W. 128;
>
> *Maury-Cole Co.* v. *Lockhart Grocery Co.* (Tex. Civ. App.), 173 S. W. 262.

**The Authorities Relied On by Petitioner Are Inapposite.**

*Wilcox & Gibbs Sewing Machine Co.* v. *Ewing,* 141 U. S. 627, 35 L. Ed. 882—This case was decided more than forty years ago and has never been cited or followed by this court. It has been distinguished in *McMaster* v. *Chevrolet,* 3 Fed. (2) 469, and in *Standard Fashion* v. *Magrane Houston Co.* (C. C. A. 1), 259 Fed. 793.

In the latter case, an agreement between a publisher and a distributor of fashion books contained a provision for termination, reading as follows (p. 794):

> "Either party desirous of terminating this agreement must give the other party three months' notice in writing within thirty days after the expiration of any contract period as above specified, the agency to continue regularly during such three months."

A question at issue was whether the contract established a relationship of principal and agent, or vendor and vendee. The court, in affirming a judgment construing the agreement as not establishing an agency, distinguished the *Willcox* case, stating (p. 794):

> "We also agree with the District Court that the contract does not establish an agency 'properly so termed,' but that it is a contract for sale. The case is easily distinguishable in this regard from *Willcox & Gibbs Co.* v. *Ewing,* 141 U. S. 627, 12 Sup. Ct. 94, 35 L. Ed. 882. Full title passed from the plaintiff to the defendant. The defendant was selling its own goods to its own customers; it was not, under delegated authority, selling plaintiff's goods to the plaintiff's customers. (Citing cases.)
>
> "An agency is not created simply by calling a contract for sales an agency contract."

The court, in reaching this result, applied the test whether the publisher would be liable in tort for any misrepresenta-

tion made by the distributor or vendee in selling the patterns, and stated (p. 794):

> "Obviously, if the defendant was the plaintiff's agent, its misrepresentations, made in the course of the business of the agency, would bind the plaintiff. We think the plaintiff would be surprised to find this or any other court holding it responsible for such tortious conduct of the defendant with relation to the sale of these patterns."

*International Harvester Co.* v. *Kentucky,* 234 U. S. 579, 58 L. Ed. 1479. This case involved the extensive activities of the International Harvester Company in selling and receiving payment for its merchandise in the State of Kentucky. This court described those activities in this language (p. 585):

> "Here was a continuous course of business in the solicitation of orders which were sent to another state, and in response to which the machines of the Harvester Company were delivered within the State of Kentucky. This was a course of business, not a single transaction. The agents not only solicited such orders in Kentucky, but might there receive payment in money, checks, or drafts. They might take notes of customers, which notes were made payable, and doubtless were collected, at any bank in Kentucky. This course of conduct of authorized agents within the state in our judgment constituted a doing of business there in such wise that the Harvester Company might be fairly said to have been there, doing business, and amenable to the process of the courts of the state."

The opinion continues (p. 587):

> "In the case now under consideration there was something more than mere solicitation. In response to the orders received, there was a continuous course of shipment of machines into Kentucky. There was

> authority to receive payment in money, check, or draft, and to take notes payable at banks in Kentucky."

It is noteworthy that in the *Harvester* case counsel for the plaintiff-in-error conceded that the person upon whom service was made "was one designated by the law of Kentucky as an agent to receive summons on behalf of the Harvester Company" (p. 583) and did not challenge the adjudication to that effect by the Court of Appeals of Kentucky. In the case at bar, there is no such concession and respondent earnestly contends that Page was not authorized to represent or to bind respondent in any way or for any purpose.

It is unnecessary to contrast the facts of the *International Harvester* case with those of the case at bar, where there was no solicitation of business by defendant, no collections were made, no monies were deposited, no notes were taken by respondent in the State of Texas, nor was there any property belonging to it in said state.

The most vital distinction between the two cases is that in the *Harvester* case, that company was selling and delivering in Kentucky its own merchandise and receiving payment therefor by notes, checks or drafts which were payable in said state. These continuous and extensive activities were conducted by its own duly authorized agent and with its own customers. In the case at bar, Page, the distributor, was selling his own merchandise, not that of defendant, and to his own customers; he made collections for his own account and not for the account of defendant, and the business which he conducted was his own and not that of defendant. The distinction is clearly pointed out in *Truck Parts, Inc.* v. *Briggs Clarifier Co.*, 25 Fed. Supp. 602, and *Standard Fashion Co.* v. *Magrane Houston Co.* (C. C. A. 1), 259 Fed. 793.

## POINT II.

### Sundry unsound contentions of petitioner.

Petitoner asserts (p. 10): "The contract specifically provides that title to the magazines does not pass in the State of New York. * * * If respondent has title to its magazines while they are in Texas, most certainly it is publishing and selling these magazines in Texas."

This statement is grossly inaccurate, misleading and utterly unwarranted by anything in the record. The last sentence of paragraph 10 of the distributor's contract, on which petitioner relies, refers exclusively to "returns," i. e., copies of "coverless magazines" which the distributor returns for credit and which he agrees to render unreadable. To guarantee the destruction of such magazines (in order that they may not be sold at reduced prices), it was provided that title to such coverless magazines remain with the respondent "until returns are so destroyed" (R. 28). The contract, of course, must be read as a whole and paragraph 2 thereof (R. 26) provides that respondent shall ship these magazines "to the distributor f. o. b. Lubbock, Texas." Thus, by the very terms of the contract and as a matter of law, title passed upon the delivery of the periodicals to the carrier in New York, upon payment of freight charges to Lubbock.

See:

Section 100, Personal Property Law of New York, being the same as Section 19, Uniform Sales Act;

*Standard Casing Co.* v. *California*, 233 N. Y. 413;

*Nelson Bros.* v. *Perryman*, 48 Fed. (2d) 99.

Even though Page was privileged to return within a definite time unsold merchandise and to receive credit at the wholesale price, the passage of title was unaffected.

See:

Rule 3, Section 100, New York Personal Property Law, also known as Section 19, Uniform Sales Act;

*Bernadette, Joseph & Co.* v. *Van Buren,* 212 (N. Y.) App. Div. 702;

*Graecen* v. *Poehlman,* 191 N. Y. 394, 397;

55 Corpus Juris, Title Sales, Section 470.

Under the terms of the contract, Page agreed to pay for all magazines shipped to him on or before the 10th day of the month following shipment thereof (R. 27). He had to pay for them even though his customers, to whom he had sold them, for any reason failed to pay (R. 58). Even if they were not sold, he had to pay for them, provided he did not exercise the option to return unsold magazines and deliver them to the defendant with all charges prepaid within a specified number of days after date of issue (R. 26, 55). Under paragraph 10 of the contract (R. 28), to obtain credit for "returns," he was required "to ship to defendant the covers and destroy all coverless (otherwise known as 'returns') copies," title to which (because they were repurchased) was to remain with defendant until they were destroyed. This was designed as protection to respondent and did not affect the passage of title when they were originally shipped from New York to Page. This is a common practice with manufacturers and publishers engaged in interstate business.

See:

*Furst* v. *Brewster,* 282 U. S. 493;

*Item Co., Ltd.* v. *Munn, et al.,* 293 S. W. 670 (Court of Civil Appeals, Tex.);

*Watkins* v. *Waldo, et al.,* 230 Pac. 1051.

Page testified that he operated a wholesale magazine and newspaper business at Fort Worth and had a 51% interest

in a similar business operated at Lubbock under the name of Lubbock News Company, and that his business is operated independently of the defendant, from whom he buys magazines, for which he pays (R. 66-69); that of the business done by him about 5% is in magazines purchased from the defendant (R. 68-69). He pays his own rent, hires his own employees, and is free to conduct his business as he pleases (R. 69-70). When he collects money, he retains it for it belongs to him and not to defendant (R. 72).

Appellee emphasizes certain other clauses of the contract requiring Page to confine his sales to a limited territory and to use due diligence, which provisions are commonly found in agreements between manufacturers, publishers and wholesale dealers, and which have been held by the courts not to establish the relation of principal and agent. See:

*Rosenbluth* v. *Hudson Motor Car Co.*, 265 Fed. 680;

*Creager* v. *P. F. Collier*, 36 Fed. (2d) 783;

*McMaster* v. *Chevrolet Motor Co.*, 3 Fed. (2d) 469.

In *McMaster* v. *Chevrolet Motor Co., supra*, where the contract embodied similar conditions, in addition to others not present here, such as the right of the manufacturer to examine the records and accounts of the dealer, the court said (p. 475):

> "The plaintiff also lays stress upon the fact that under the contract it is the duty of the dealer to promote the interests of the seller; but this does not necessarily show the relationship of agency. There is no reason why a manufacturer or wholesaler may not require of all persons to whom he sells his goods to do all they lawfully can in making resales to promote his interests.

> "As I view this contract, the case is simply this: The manufacturer desires to sell his products in such manner only that his interests may be promoted. He therefore demands as a part of the price in the making of the contract that the person to whom he sells his goods shall submit to certain restrictions. The person desiring to buy the manufacturer's goods is anxious to purchase them, and in order to purchase them is willing to submit to the conditions and restrictions named. A consideration of the whole contract and all its terms shows that the parties were studiously careful to make a contract of sale and not a contract of agency. They certainly had a right to do this, and if that was their real intention it is the duty of this court to give affect to that intention."

The Court's attention is invited to the analysis of the contract in that case, appearing in the court's opinion at page 472—the right of the vendor to audit the dealer's books, the limitation of the dealer's territory, the control of the manufacturer over the number of cars to be taken by the dealer, the dealer's obligation to maintain a service and sales room, his obligation to carry spare parts, the manufacturer's right to inspect the dealer's stock of repair and replacement parts and to insist that adequate supplies be maintained at all times, the dealer's obligation to use due diligence to promote the manufacturer's business, the manufacturer's control over the "prices and charges, including freight, handling charges and taxes paid" by the dealer, and the dealer's right to use the name "Chevrolet" as a part of its corporate and business name, and in the telephone directory. Considering all of these elements of proof, the court, nevertheless, held that the manufacturer was not doing business in the State of South Carolina. *A fortiori*, in the case at bar, when all of these factors are lacking, there can be no doubt that this respondent was not doing business in the State of Texas.

Again, petitioner places great emphasis upon the following clause in the contract (R. 29):

> "This agreement may be terminated without notice in case of change in postal rates, strikes, wars, Government orders, destruction by the elements or other acts of God, or causes beyond the Company's control that alter present conditions of periodical distribution, or for nonpayment of bills, or unsatisfactory service as agent of the Company."

Obviously, this inaccurate reference to the distributor as an agent does not make him one. "An agency is not created simply by calling a contract for sales an agency contract"—*Standard Fashion Co.* v. *Magrane Houston Co.* (C. C. A. 1), 259 Fed. 793.

Even if Page were an "independent agency," it would not render respondent subject to the jurisdiction of the Texas court. "It might have conducted such business through an independent agency without subjecting itself to the jurisdiction"—*Cannon Manufacturing Co.* v. *Cudahy Packing Co.*, 267 U. S. 333, at page 336.

The learned Circuit Court of Appeals correctly appraised the situation when it said (R. 205):

> "We think these provisions are without significance in determining the question here, which is, whether the company was doing business in Texas so as to be present there, and whether Page was their agent in the doing of that business, so that service upon him would subject it to the court's jurisdiction. It is settled law that in order to hold a foreign corporation, not licensed to do business in a state, responsible under the process of a court of that state, the record must disclose that it was carrying on business there at the time of the attempted service, in such wise as in effect to be present there. (Citing cases.) * * * In the light of these authorities, it is perfectly clear upon the record here, that appellant was not doing

> business in Texas, so as to be present there, and that Page was not its agent or other representative, so that service upon him would be service upon the company."

In submitting this brief, respondent still makes only a special appearance and still insists that the trial court did not have jurisdiction of the person of the defendant and relies upon all of the reservations and exceptions taken before the trial court, and the brief is signed with the same reservations and exceptions.

## POINT III.

**The application for a writ of certiorari should be denied.**

Respectfully submitted,

NEIL P. CULLOM,
*Counsel for Respondent.*

NEIL P. CULLOM,
JAMES E. FREEHILL,
*on the Brief.*